

Exhibit 2

to

Memorandum of Law in Support of Defendant's Motion
to Dismiss the Indirect Purchaser Plaintiffs' Consolidated
Amended Class Action Complaint

EXHIBIT A

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2) SS.
3 COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT
4 *****
5 LINDA CORNELISON, on behalf)
6 of herself and all others.)
7 similarly situated,)
8 Plaintiff,)
9 vs.) Motion Hearing
10 VISA USA, INC., MASTERCARD) Case No. CIV03-1350
11 INTERNATIONAL, INC.,)
12 Defendant.)
13 *****
14 PROCEEDINGS: The above-entitled matter commenced on the 28th
15 day of September, 2004, at the Pennington County
16 Courthouse, Rapid City, South Dakota.
17 BEFORE: The Honorable Janine M. Kern
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19 Mr. Stephen V. Bomse
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25 Mr. Gregory Erlandson
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Representing Defendant Mastercard.

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Representing Defendant Mastercard.

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1 THE COURT: This is the time and place set for
2 motion hearing in File Civil C03-1350, in the matter of
3 Linda Cornelison, on behalf of herself and all others
4 simply situated, plaintiffs, versus Visa USA, Inc. and
5 Mastercard International, Inc.

6 If the Plaintiffs would begin by noting their
7 appearance with local counsel first, please.

8 MR. EISLAND: Aaron Eisland, local counsel for
9 Plaintiff.

10 MR. MITBY: Steve Mitby, your Honor, for
11 Plaintiff. I will spell my last name, M-I-T-B-Y.

12 THE COURT: Thank you.

13 MR. LEBRUN: Gene LeBrun for Visa USA, Inc.

14 MR. ERLANDSON: Good afternoon, Greg Erlandson,
15 local counsel on behalf of Mastercard.

16 MR. BOMSE: Stephen Bomse, B-O-M-S-E, for Visa.

17 MS. CROWLEY: Good afternoon, Patricia Crowley
18 on behalf of Mastercard International, Incorporated.

19 THE COURT: Thank you. Mr. Bushnell (sic) and
20 Mr. Erlandson, you have filed a motion to dismiss. I
21 would like to begin with you and then I'll hear from
22 Plaintiff's counsel.

23 I'm sorry, Mr. LeBrun.

24 MR. LEBRUN: Mr. Bromse will make the argument.

25 MR. BOMSE: Your Honor, I don't know if you

1 have any preference as to whether or not counsel stands
2 when they address you or remain seated.

3 THE COURT: Either. Whatever you are most
4 comfortable with. You can sit, you can stand.

5 MR. BOMSE: I'm actually going to stand up and
6 test my eye sight here, but if I find my notes are
7 swimming, I may change my mind.

8 Thank you, your Honor. It's very nice of the Court
9 to set aside this time to hear us on this motion. As
10 your Honor may be aware, from the papers, this is one of
11 a number of what we call follow-on lawsuits which were
12 filed in various states around the country, approximately
13 20 of them, in the wake of the settlement of a federal
14 antitrust class action against my client, Visa and
15 Mastercard. And the way we have been doing this in the
16 various states, is Mastercard and Visa have divided up
17 the arguments so I will be speaking this afternoon
18 principally on behalf of both defendants. If the
19 Court --

20 THE COURT: That's fine.

21 MR. BOMSE: In those cases we have argued a
22 number of these motions previously and five of them have
23 been decided already.

24 We referenced three in our papers, New York,
25 Michigan and North Dakota, where the courts granted our

1 motions to dismiss essentially on the same grounds that.
2 we urge here. There is a fourth case that was decided
3 subsequent to the last briefs which is Minnesota. It's a
4 case called Gordon Gutzwiller and the Court has received
5 that opinion which we sent in subsequently.

6 There is -- in addition, a fifth case, which, like
7 the other four, also dismissed the antitrust claims,
8 although in that case it was on entirely unrelated
9 grounds. Obviously, we hope that we'll be able to
10 persuade your Honor that those cases were correctly
11 decided and that your Honor will elect to follow them.

12 We believe that while it is clear that South Dakota,
13 like the other states in which these cases are pending,
14 has decided that it does not wish to bar all indirect
15 purchaser cases. That in no means grants a license for
16 any and all indirect purchases or cases without regard to
17 any standing limitations. We believe rather that the
18 intention of the legislature was that in appropriate
19 cases indirect purchaser cases be permitted, but that
20 there still needs to be an analysis of standing under
21 what the Supreme Court and various other courts have
22 referred to as the analytically distinct requirement of
23 standing. Analytically distinct, that is from the
24 Illinois Brick Rule which is a specific federal policy
25 based rule.

1 Now, just to put this matter in some context
2 factually. We, of course, accept the allegations of
3 Plaintiff's complaint for these purposes. They claim
4 that Visa and Mastercard have rules which improperly tie
5 the acceptance of Visa and Mastercards credit cards to
6 Visa and Mastercards debit cards. They claim that, as a
7 result of that, merchants ended up paying more to accept
8 Visa debit cards than they otherwise would have. To that
9 extent, these cases and the federal case are entirely
10 common. That was that description I just gave you was a
11 description of the claim in the federal case.

12 In the federal case, that was where it stopped.
13 That is, the merchants claimed that they ended up paying
14 too much money and as your Honor again may know, if
15 you've had an opportunity to read the papers, we settled
16 those cases on the eve of trial facing a 100 billion
17 dollar damage exposure paying three billion dollars
18 seemed like the better part of valor.

19 Now, in these cases, we regard as important and we
20 find depositively a different additional step because the
21 claim now made is that once those merchants pay too much,
22 as it's alleged, to accept Visa and Mastercard debit
23 cards, they, in turn, raise the prices of everything they
24 sold to every consumer and regardless of how that
25 consumer paid for those things. Thus we don't have a

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1 claim here that involves the purchase of our service, our
2 debit card service, which is offered to merchants. We
3 don't even have a claim, based upon the resale of a
4 product containing that service as an ingredient. It's
5 hard -- hard to imagine litigation. Particularly what
6 that means, it's clear that it doesn't include the claims
7 here because in fact we know that according to the
8 plaintiff's theory and their complaint, it doesn't matter
9 whether a debit card in fact entered into the resale
10 transaction.

11 In that sense, these claims are what we have
12 referred to in our papers as overhead claims. It is, as
13 if some cost of doing business, we gave an example of a
14 telephone service where the telephone prices went up to
15 merchants and the theory would be the merchants then
16 raised the price of spaghetti or tennis rackets or
17 television sets because they paid too much for telephone
18 service. Or to use an example that the Plaintiffs seem
19 to be fond of. They say this is a tax and a tax is in
20 effect a form of overhead. It's a cost of doing
21 business. And the question that we confront here today
22 is, can you bring a claim like that merely because South
23 Dakota, which generally follows federal law, and there is
24 abundant law that says that they are expected to follow
25 antitrust law merely because in this case the South

1 Dakota legislature has decided that we are going to a
2 limited extent to depart from federal law by allowing
3 indirect purchaser cases to be brought.

4 They say that the language of the statute begins and
5 ends. The inquiry although, as I'll explain in a few
6 minutes, even they don't really believe that because they
7 don't argue that there is no standing limitation. They
8 just want you to adopt a different one. Something they
9 call target area and I'll come back to that.

10 But their basic position is when Illinois Brick was
11 disavowed in South Dakota, that was the end of standing.
12 We say that that is not so. Any more than it was found
13 to be so in New York or Michigan or North Dakota or
14 Minnesota and any more than courts in those states in
15 other cases not involving the Visa and Mastercard have
16 simply abandoned the standing inquiry because they are
17 Illinois Brick repealer states.

18 **THE COURT:** Well, how would you respond to the
19 Plaintiff's alternative suggestion to the Court that if
20 the Court is persuaded by your argument, that they should
21 be allowed to redefine the class to include only South
22 Dakota residents who purchase goods or services using
23 Visa or Mastercard branded debit cards?

24 **MR. BOMSE:** Well, I would say this. I would
25 say that it is a class definition which makes no sense in

1 terms of the allegations. It's an attempt really in a --
2 I don't want to be projective in suggesting it's cute
3 because that's not exactly what it is. But it is
4 attempting to connect two things that have no connection.
5 Let me explain what I mean. The theory that they have,
6 because that's -- we know it from the class that they
7 have originally defined here and everywhere is a class in
8 which the presence or absence of a debit card has nothing
9 to do with the offense. So we know, as we start out,
10 that there is no causation here that involves a debit
11 card otherwise that would have been the class that they
12 would have defined.

13 Their theory inside is in the same way as my
14 telephone or tax or janitorial service example, somebody
15 pays too much, they end up passing the cost along in all
16 products. So that the presence or absence of a debit
17 card is therefore unrelated to the theory of violation.
18 To give the Court an example, I'll go back to my
19 telephone example. Let us say that the theory was that
20 there was a conspiracy to raise telephone prices. The
21 claim is brought. Say prices of everything were raised
22 to every purchaser in the State of South Dakota. Motion
23 to dismiss is made. They say, well, let us redefine our
24 class as people who bought things over the telephone as
25 opposed to coming into the store. It seems to me we

1 would fairly say there, as we ought to fairly say here,
2 hey, wait a minute, that makes no sense. The existence
3 of a telephone sale as opposed to an in-person sale has
4 nothing to do with the theory of what was wrong anymore
5 than it does in this case.

6 So it seems to me that their attempt ought to fail
7 because it really doesn't have anything to do with the
8 case. I could in fact go further, but I think I would be
9 outside of the pleadings. But when we were arguing this
10 case with one of counsel's partners in Washington, DC,
11 the Judge said, you know -- because the same argument was
12 made by the same lawyers -- the Judge said, "you know, I
13 understand the theory, but isn't it somehow backwards to
14 say that it's the debit card people who somehow ought to
15 have the claim as opposed to anybody else? After all,
16 the debit card people are the people who presumably got
17 the benefit of having a debit card. They wanted to use
18 the debit card."

19 Now, I don't think you need to go that far here. I
20 think you merely need to find that there is no
21 relationship between the offense and the proposed
22 redefined class in order to say that that kind of a
23 redefinition isn't appropriate. Again, while this Court,
24 of course, is going to make up its own mind, this issue
25 was briefed specifically in Michigan on a motion for

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1 reconsideration which the Court denied as having raised
2 no new arguments.

3 Now, your Honor, if we go back to the question of
4 why we say standing rules still ought to apply here. It
5 seems to me, that we go back to the fact that we do have
6 a difference between Illinois Brick and standing rules.
7 As I said, analytically distinct. And courts have
8 recognized that one needs to still look at whether a
9 claim is so remote, whether the damages claimed are so
10 speculative and complicated in proof that we really are
11 beyond the bounds of what is sensible even in a place
12 where indirect purchaser cases are allowed.

13 As I say, in none of the states where we have been
14 successful so far has the law been any different. We
15 have here not a claim that somebody's bought a product
16 that indirectly passed through a chain of distribution,
17 we don't have a claim that this is a product that became
18 an ingredient in something that passed through a chain of
19 distribution. We have a claim here that is in effect for
20 every single product purchased by anybody not even in a
21 way that involves this product. This is, as we say, a
22 non-purchaser case just as the Court found in Michigan
23 and then more recently in Minnesota and North Dakota.

24 You really don't have an assault, Plaintiffs
25 arguments to the contrary notwithstanding. You don't

1 have an assault here on indirect purchaser cases. You
2 have here a sensible application of some limits to claims
3 which really can't be proven and if we think about what
4 it is that's being alleged here and what it is the Court
5 is being asked to embark upon if this case goes forward,
6 I think that that becomes clear. I don't know what it is
7 that Ms. Cornelison does or doesn't do herself in terms
8 of purchase, but if I think of myself on a Saturday
9 morning going out to do the errands, you go to the gas
10 station, you fill up your tank and you pay perhaps with
11 cash. You go to the grocery store, maybe you buy 20 or
12 30 different items. You might write a check there. You
13 go pickup the dry cleaning, maybe you go and buy yourself
14 a new tennis racket, at night maybe you go out to dinner.
15 One day one person we now have to know what is it that
16 happened with respect to the dry cleaning and the corn
17 flakes and the gasoline and the meal in the restaurant
18 and the tennis racket. We have to know what it is that
19 happened to the price of those goods because of some tiny
20 little fraction. Because, to begin with, the price that
21 merchant pays for card services is on the order of one to
22 one and a half percent, if it's a debit card. By the
23 time you spread -- decide what portion of that is, quote,
24 "an overcharge", and you then spread out that overcharge
25 out among all of the purchases, you can't be talking

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1 about more than let's say ten cents on a hundred dollar
2 purchase.

3 And yet the theory is that for all of these various
4 things, somehow prices were affected in a way that
5 adversely affected Ms. Cornelison and any other consumer
6 in a class to be certified in this state. And it doesn't
7 seem to me that once you think of it in those terms, that
8 the rhetoric which the courts have been prompted to use
9 in Michigan and in New York and in Minnesota is really
10 hyperbolic at all when they say these claims are far
11 beyond the capacity of a court to try. So speculative
12 that no expert could possibly deal with them and
13 therefore not of a kind that are capable of being
14 adjudicated under the antitrust laws whether you allow
15 indirect purchaser claims or you don't.

16 I really do think that in some ways the Minnesota
17 Court, which is the most recent and I think the most
18 elaborate, pretty well incapsulated what we would have to
19 say to your Honor in the summary of its ruling. The
20 Court said that, "despite the broad language of the
21 Minnesota antitrust law as set forth in that statute and
22 the broad language contained in a case in that court,
23 called Philip Morris, not every person claiming some
24 remote or tangential injury from an antitrust violation
25 can maintain a suit under the Minnesota antitrust laws."

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1 The Judge then said "a literal reading of the Minnesota
2 statute is broad enough to encompass any harm it can be
3 attributed either directly or indirectly to the
4 consequences of an antitrust violation." That being, of
5 course, exactly the argument that the plaintiffs make.
6 They say, "even though" -- I'm sorry, the Court in
7 Minnesota said, "even though the language of the statute
8 is clear and unambiguous, the Court must interpret the
9 statute in a manner which will not lead to an illogical
10 or absurd result."

11 "In this case, the Plaintiff's proposed
12 interpretation would lead to a decision that would
13 provide a remedy in damages for any injury, however
14 minor, that might conceivably be traced to the antitrust
15 violation in issue. In short, the Plaintiff's proposed
16 construction of the Minnesota antitrust law, carried to
17 its logical conclusion, would provide the general public
18 and/or general taxpayer standing to sue for most
19 antitrust causes of action."

20 "In this case, the Plaintiff's proposed class is
21 likely as large or larger than a class limited to
22 Minnesota residents who pay property or income taxes."

23 "In this case, Plaintiff has only an abstract or
24 tenuous connection to the subject matter of the case.
25 Therefore, he lacks standing to sue for the injuries he

1 claims to have incurred."

2 Now, that's longer than I ordinarily would trouble
3 the Court to read, but it seems to me that there is a
4 particular reason why it is appropriate to read to the
5 Court at that length from the Minnesota opinion. And
6 that is that the Plaintiff's have in fact told your Honor
7 that you ought to pay particular attention.

8 THE COURT: What page, Counsel?

9 MR. BOMSE: Page 12. There is pages eight and
10 nine and pages 12 here. I'm reading, your Honor,
11 Minnesota's antitrust statute, exactly like South
12 Dakota's, grants standing to persons injured directly or
13 indirectly by an antitrust violation. They then refer to
14 this Philip Morris case which was referenced also by the
15 Judge. Then to quote again, "because Philip Morris
16 decisively rejects defendant's arguments, it must be
17 considered in some detail." In other words, they are
18 saying, take a look at the same statutory language, take
19 a look at what Minnesota does. Well, we say, amen to
20 that, but the decision that one, of course, needs to take
21 a look at, we suggest, is the decision addressing a claim
22 which is virtually identical brought by the same counsel
23 and decided within the past few weeks.

24 It is also the case, your Honor, that South Dakota
25 actually has a statute which urges the Court to construe

1 its laws in a way that is congruent with the laws of
2 other states. Not only the federal law, but the laws of
3 other states. It's 37-1-22. And Plaintiff's also, in
4 their brief, again urge the same -- the same thing here
5 at pages eight and nine. Decisions -- again quoting,
6 "decisions from other state courts construing statutes
7 with virtually identical language provide persuasive
8 authority as to how South Dakota courts should interpret
9 South Dakota's antitrust law and they quote there SDCL
10 37-1-22. It is the intent of the legislature that in
11 construing this chapter, that the courts may use, as a
12 guide, interpretations given by state courts to
13 comparable antitrust statutes.

14 I would say, your Honor, that in this case the
15 comparable antitrust statutes, by their own terms, is
16 Minnesota, but it also is New York which is a repealer
17 state. Michigan, that's the Stark case, which has
18 essentially identical language and is a case again
19 brought allegedly essentially identical violations by the
20 same counsel, and North Dakota. It is not merely that
21 those courts have ruled in the way they have done, but
22 the fact that their analysis, we believe, is correct,
23 that together with the statute urging conformance, we
24 would suggest, adds yet further support for the broad
25 argument that we would make.

1 So, your Honor, we have tried to set out as
2 carefully as we can and as clearly as we can why we think
3 these cases can't go forward. I've tried today to
4 summarize for the Court what our views are on that issue
5 and while I'm, of course, happy to respond to questions
6 that the Court has, at this point that would be our
7 submission.

8 THE COURT: All right. The Court would like to
9 hear from Ms. Crowley. Is there anything you want to
10 add?

11 MS. CROWLEY: No, I have nothing to add. Thank
12 you, your Honor.

13 THE COURT: All right. Counsel?

14 MR. MITBY: Thank you, your Honor. Steven
15 Mitby on behalf of the -- on behalf of the Plaintiff.

16 Your Honor, this case is about South Dakota law not
17 federal law, not New York law and not the law of any
18 other state.

19 First, motions to dismiss are extremely disfavored
20 under South Dakota law and are rarely granted unless this
21 case is an extremely unusual case in which the pleadings
22 alone demonstrate to your Honor that there is no way that
23 the Plaintiffs could prove a cause of action, this Court
24 should not consider dismissing these claims of the
25 pleadings.

1 Secondly, by enacting one of the broadest antitrust
2 remedial statutes in the United States, the South Dakota
3 legislature explicitly rejected the very limitations on
4 standing that the Defendants advance here. South Dakota
5 Codified Law 37-1-33 states unequivocally, and I'm going
6 to quote, "no provision of this chapter may deny any
7 person who is injured directly or indirectly in his
8 business or property by a violation of this chapter, the
9 right to sue for and obtain any relief afforded under
10 Section 37-1-14.3".

11 Now, under the expressed terms of this statute,
12 Plaintiffs have an absolute right to bring this action in
13 a South Dakota court because they were injured by
14 defendant's anti-competitive conduct. Defendant's
15 illegal tying arrangement caused injury to consumers by
16 raising the price of consumer goods throughout and in
17 fact, the defendants do not even deny that consumers made
18 a portion of the fees that they charged to merchants and
19 how could they? Whatever portion. Excessive fees
20 merchants didn't absorb of your overhead, consumers might
21 have paid in higher prices in this case. There are two
22 groups of victims in the Defendants' anti-competitive
23 conduct, consumers and merchants. Moreover, the injury
24 to merchants is not speculative or remote. While
25 merchants absorb and part of it, like 12 billion dollars

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1 over the nation by out of pocket. No one, including the
2 defendants, disputes that the consumers also paid a
3 substantial share of those costs.

4 Now, in an effort to avoid the implication was South
5 Dakota broad remedial and defendants are here seeking to
6 draft the federal standing requirement under 37-1-33.
7 Federal standing requirements are not appropriate for
8 South Dakota law because they're based on an entirely
9 different type of antitrust injury. Federal law doesn't
10 recognize antitrust injury to indirect purchasers or
11 anyone else besides those who bought directly from the
12 defendant engaged in the illegal anti-competitive
13 practice.

14 In this case, your Honor, the defendants ask this
15 Court to adopt the Supreme Court's five factor test for
16 antitrust standing which was articulated in the
17 Associated General Contractors case. That case was
18 decided ten years after the Supreme Court decided the
19 Illinois Brick case and adopted the direct purchaser
20 limitation. At the time Associated General Contractors
21 was decided, the direct purchaser limitation was a
22 feature federal antitrust law and standing requirements
23 were crafted liberally in order to further the purposes
24 of the federal antitrust statute which was to limit
25 compensation to direct purchasers and avoid a series of

1 lawsuits by indirect purchasers who couldn't be
2 compensated under substantive federal law anyway. And
3 consistent with the Supreme Court standing, Juris
4 Prudence in other areas, the Court adopted a test that
5 quite logically focussed on whether the plaintiff had
6 sustained a legally cognizable injury and was capable of
7 recovering damages. That's the five factor test that the
8 Supreme Court adopted and the Supreme Court encouraged
9 lower courts in the federal system to consider factors
10 such as whether the plaintiff is a consumer or a
11 competitor in the restrained market, whether the injury
12 alleged is direct firsthand impact of the restraint
13 alleged, whether there were more directly injured
14 plaintiffs with a motivation to sue and whether the
15 plaintiffs claims would resist duplicative recoveries or
16 compensation from damages. Precisely factors that
17 prompted the Court in Illinois Brick to adopt the direct
18 purchaser limitation in the first place, your Honor,

19 So the South Dakota legislature had an opportunity
20 to consider these factors when it rejected the direct
21 purchaser limitation and adopted Section 37-1-33 which
22 gives anyone who has been injured by an antitrust
23 violation the explicit right to sue.

24 THE COURT: What is the import of the last part
25 of that statute "in any subsequent action arising from

1 the same conduct, the Court may take any steps necessary
2 to avoid duplicative recovery against a defendant"?

3 MR. MITBY: Well, I think that is a logical
4 outgrowth of the statute. It gives the Court the right
5 to limit damages in some way or take some other measure
6 in the context of an individual case to prevent a
7 duplicative recovery and that makes sense. But what the
8 South Dakota legislature rejected, and I think this
9 second sentence of the statute proves it, is the idea
10 that the risk of duplicative recovery should somehow be
11 generalized that a standing requirement that applies to
12 all cases.

13 The South Dakota legislature has vested this court
14 and every other court in South Dakota with the duty of
15 fashioning remedies in a particular case such as
16 limitations on damages, such as some way of bringing
17 together all of the potential plaintiffs into a single
18 lawsuit as a way of avoiding duplicative recoveries. The
19 legislature didn't authorize South Dakota courts to adopt
20 general rules of standing that would preclude a recovery
21 by an indirect purchaser simply because there is an
22 inherent risk of duplicative recoveries.

23 So I think that the second sentence of that statute
24 confirms the point that the Plaintiffs are trying to make
25 in this case, which is that we -- we are entitled to a

1 case -- a decision in the context of this individual case
2 about how best to reduce any potential risk of
3 duplicative recoveries and I think, as this Court will
4 recognize after discovery has been completed, the
5 settlement that Defendants paid to the merchants as a
6 result of the class action, the prior merchant class
7 action, was only a tiny fraction of the damage that was
8 actually caused in those cases and that is inconsistent
9 with the purpose of the antitrust laws which is to
10 provide for treble damages for violations of antitrust
11 policy.

12 THE COURT: The parties chose to settle. We
13 don't know what the damages would have been should the
14 matter been tried.

15 MR. MITBY: That's correct, your Honor, but my
16 point is that this Court would be entitled to give them
17 settlement credit or find some other remedy to ensure
18 that there is no duplicative recovery in this case. But
19 South Dakota has rejected the notion that the risk of
20 duplicative recovery should be incorporated into
21 generalized standing requirements. The source that the
22 federal system has adopted.

23 The standing test in Associated General Contractors
24 is related to the types of injuries that are compensable
25 under federal law and, of course, this makes sense

1 because the Supreme Court has explained again and again
2 that a legally recognized injury is a fundamental
3 requirement for standing. There is a series of decisions
4 on this point and I have brought along one with me to
5 show to the Court for illustrative purposes. May I
6 approach, your Honor?

7 THE COURT: Yes.

8 MR. MITBY: This is a recent decision, Bennett
9 versus Spear from the 1997 term of the Court. And if,
10 your Honor, will look to the highlighted text, Justice
11 Sclera wrote, "to satisfy the case or controversy
12 requirement of Article III, a plaintiff must, generally
13 speaking, and demonstrate that he has suffered injury in
14 fact, that the injury is fairly traceable to the actions
15 of the defendant and that the injury will likely be
16 redressed by a favorable decision". There is language of
17 this sort in a variety of decisions from the United
18 States Supreme Court over the years addressing standing.

19 The point of this is that in the federal system
20 courts adopt standing rules that further the goal of
21 compensating plaintiffs who are entitled to be
22 compensated and who can show an injury. Under federal
23 law an indirect purchaser can't show that type of injury
24 because that type of injury isn't recognized by federal
25 antitrust laws. It would not make sense to take standing

1 requirements that have been developed for the sole
2 purpose of trying to screen out folks that can't allege a
3 legally recognized injury and import them into South
4 Dakota law which has rejected the federal concept of
5 injury allows indirect purchaser suits. In fact, goes so
6 far to say that anyone injured by an antitrust violation
7 has a right to sue for damages under South Dakota law.

8 The only factor in the federal test that is not
9 explicitly related to whether the antitrust injury was
10 direct or indirect, is whether the damages claims are
11 speculative. And in this case the defendants have no
12 basis at this very preliminary stage of the litigation
13 for arguing that the damages claims are speculative
14 because there has been no discovery, there has been no
15 expert analysis. Plaintiffs haven't had an opportunity
16 to come forward to this Court as in responding to a
17 motion for summary judgment and show exactly what
18 evidence we have adduced that demonstrates that these
19 claims for damages are not speculative.

20 If, at some point down the road, defendants can
21 convincingly argue to this Court that the damages claims
22 are speculative, couldn't be proved with certainty,
23 aren't entitled to compensation under South Dakota law,
24 then this Court can and should revisit Battley
25 (phonetic), but defendants aren't arguing that because

1 thus motion to dismiss and under South Dakota law the
2 defendants can't attach any evidence or make any
3 evidentiary arguments that are based on the facts of this
4 case. They have to look solely to the pleadings.

5 I would submit that when counsel for Visa says that
6 the damages claims in this case are speculative, he is
7 relying on an assumption about what the evidence is going
8 to show at a later stage and we, as Plaintiffs, have not
9 had the opportunity to show to this Court what the
10 evidence in fact proves. So we would like to -- we would
11 like to save those arguments about whether this is --
12 this claim is speculative or not until both sides are in
13 full possession of the facts.

14 Now, defendants, throughout their argument this
15 morning, have offered no reason for this Court to
16 disregard the plain language of Section 33-1-33.
17 Defendants proposed limitation on standing would leave
18 most of the injured parties in this case without any kind
19 of remedy at all. And I submit that that result,
20 your Honor, is plainly contrary to the legislature's
21 purpose in enacting Section 37-1-33 and that purchase was
22 to afford, quote, "any person", end of quote, injured by
23 an antitrust violation, the right to sue regardless of
24 whether the injury was direct or indirect. And under
25 defendants rule, only the merchants could sue for

1 inflated prices paid to consumers as a result of an
2 illegal tying arrangement. This approach would leave
3 consumers who are, by far, the most populous group of the
4 defendants antitrust victims without any kind of redress
5 at all.

6 I want to respond briefly to a point that the
7 defendants made when they said that that the overcharges
8 are alleged to be spread over a wide variety of consumer
9 goods and weren't really limited to people who were
10 consumers in one imagination or another of Visa and
11 Mastercard. I think that that argument really proves too
12 much. It would leave consumers in this case without a
13 remedy precisely because of the manner in which the
14 defendants chose to implement their tying ring. In
15 particular, Visa and Mastercard specifically prohibit
16 merchants from assessing on a debit card transaction a
17 fee directly to the debit card user. Under Visa's own
18 rules merchants are required to spread whatever portion
19 of that cost that they don't absorb in that overhead on
20 to all consumers. They can't just target pick debit card
21 users. Presumably not very many people would use the
22 Visa debit card. This puts defendants in the position of
23 being able to adopt policies that automatically deny most
24 of their victims standing to sue and thus any possibility
25 of compensation and this lesson will not be lost on

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1 future antitrust violaters. It will almost certainly
2 endeavor to structure their conduct as to take advantage
3 of any judicially created bars to recover. Given the
4 South Dakota legislature's unambiguous mandate in favor
5 of broad antitrust remedies, this outcome would be
6 unaccepted.

7 The defendants have also claimed that the
8 Plaintiff's injuries are somehow derivative or remote.
9 This is wrong for several reasons. First, no one
10 disputes that South Dakota law provides a remedy for an
11 indirect purchasers injury. Counsel for Visa has
12 conceded this afternoon, and I don't think there is
13 anyone that would attempt to read that type of provision
14 out of the statute, but in this case the injury to
15 consumers, is actually a lot less derivative or remote
16 than the injuries for indirect purchasers have recovered
17 in other cases.

18 In this case, remember, your Honor, that there are
19 only two groups of people who are potential plaintiffs
20 and potential victims of this tying arrangement,
21 merchants and consumers. There is no long supply chain.
22 There is no long, long distribution chain. There is no
23 passing through these charges through a series of middle
24 man. There is two groups of merchants and consumers and
25 the defendants would concede, I suspect, that indirect

1 purchaser cases where a good is sold to one purchaser who
2 passes it onto another who passes that onto a third and
3 even onto a fourth, that more than just the first
4 indirect purchaser would be entitled to recover. There
5 are several case that address the very issue we have
6 cited, some of them unbriefed and in the Holder versus
7 Archer Daniels Midland case where numerous indirect
8 purchasers of citric acid and other ingredients in food
9 products brought suit against Archer Daniels Midland for
10 price fixes and Archer Midland's principle argument,
11 look, these people don't have standing to sue. They
12 didn't buy citric acid, they bought orange juice and that
13 citric acid passed through a series of transformations in
14 the factory, passed through a series of distributors.
15 How can these purchasers even begin to tell us how much
16 they were overcharged because of illegal price fixing
17 conspiracy? Well, this case is really not much different
18 than that except the difference is overcharges were
19 passed directly to the consumers by the merchants. They
20 didn't pass through the middle man. There was no change
21 of the product or repeated changing of hands in this
22 transaction. The merchants decided, after they saw the
23 bill from Visa, how much they were going to raise their
24 prices on all consumer goods in order to compensate them
25 for some of that increased cost.

1 This is also not like some daisy chain of causation
2 where the telephone company is fix pricing and suddenly
3 everybody who buys anything is a victim of a vast
4 antitrust conspiracy because everybody is using --
5 because every merchant in the world uses a telephone.
6 That's not the case at all. In this case, again, the
7 charge is passed on directly to consumers. There is just
8 one middle man, that's the merchant, and the plaintiffs
9 are entitled to try to prove that there is a specific
10 amount by which they were injured in each of these cases.
11 And the -- I think this Court should consider, you know,
12 revisiting the issue of speculativeness after there are
13 some facts on the table by which the plaintiffs can try
14 to show exactly what types of injuries they sustained and
15 how much.

16 I'd like to address next the defendants' reliance on
17 case law from states with narrower remedial statutes than
18 South Dakota's. I have to confess that I have not seen a
19 copy of the Minnesota decision. It wasn't sent to me. I
20 don't have one in front of me. I would be happy to
21 comment on it at greater length for this Court after
22 having a chance to review what the Minnesota Appellate
23 Court in this case actually said. But I would submit
24 initially that the Minnesota case is a decision that has
25 not passed through appellate review including review by

1 the Supreme Court of Minnesota and this Court should pay
2 special attention to what the Supreme Court of Minnesota
3 says the law says because the Supreme Court of Minnesota,
4 reading the same type of statute, has interpreted it very
5 broadly as they did in the Blue Cross Blue Shield case.
6 Keep in mind that Blue Cross Blue Shield was suing
7 tobacco companies for driving up health care costs even
8 though I don't think anyone would argue that Blue Cross
9 Blue Shield was, in some sense, was a consumer that
10 bought products from the tobacco companies. So the
11 Minnesota Supreme Court needs a chance to be heard on
12 whether this decision is consistent with Minnesota law
13 before this Court assumes that Minnesota law would reject
14 these claims.

15 Secondly, plaintiffs rely on decisions from New York
16 and North Dakota. Well, New York and North Dakota do not
17 have statutes that are anything like Section 37-1-33. In
18 fact, if I may approach, your Honor, I brought a handout
19 for the Court that compares the language of the North
20 Dakota and New York statutes with the language of the
21 South Dakota statute. May I approach, your Honor?

22 THE COURT: Do you have a copy for counsel?

23 MR. MITBY: Yes, I do. Thank you, your Honor.
24 As your Honor will note, Section 5108.1 -- 08 and in any
25 tax for damages under this section, the fact that the

1 state said, "a person threatened with injury or injured
2 in its business or property by any violation of the
3 provisions of this chapter has not dealt directly with
4 the defendant does not bar recovery". And looking to the
5 language of New York general business law section 340
6 subsection six, the state uses similar language. It
7 says, "the fact that the plaintiff hasn't dealt directly
8 with the defendant, doesn't bar recovery". That's very
9 different from saying that any person injured by an
10 antitrust violation has the right to sue. These statutes
11 tell courts what fact they can't use as a way of denying
12 recovery all together. The South Dakota law is an
13 affirmative grant of the right to sue and implicitly of
14 standing to sue for any type of antitrust violation.

15 Now, defendants also point to the Michigan statute
16 which is approximately the same as the South Dakota
17 statute, however what defendants failed to note is that
18 Michigan courts have interpreted the rights of indirect
19 purchasers much more narrowly than South Dakota courts.
20 And I would refer your Honor to page 679 of the Microsoft
21 antitrust litigation opinion which was from the South
22 Dakota Supreme Court. It's cited actually by the
23 defendants in their brief. And when you look at what the
24 South Dakota Supreme Court has to say about Michigan law,
25 first the Supreme Court noted that Michigan was one of

1 only two states in the country that allowed indirect
2 purchaser suits, but actually refused to permit indirect
3 purchasers to participate in antitrust class actions. So
4 the Michigan Supreme Court -- or the South Dakota Supreme
5 Court first noted that Michigan is an out liar in giving
6 a narrow reading to its antitrust remedies provision and
7 then it refused to follow Michigan's interpretation of
8 that statute finding that it's interpretation was too
9 narrow.

10 So I would submit, your Honor, that Michigan and
11 South Dakota, even faced with the same type of statute,
12 have taken different paths. The South Dakota Supreme
13 Court is likely to give full effect to the broad remedial
14 provision that the legislature enacted. Thus none of the
15 defendants' authorities really address the fundamental
16 difference in this case between South Dakota law and the
17 law of the states on which they place their reliance.

18 I'd like to close by noting that, you know,
19 defendants have not argued that there are no standing
20 requirements at all in South Dakota law. That's a false
21 choice. First of all, plaintiffs have to be able to show
22 that they sustained an injury for which they can show
23 damages and at some point in this litigation, after some
24 evidence has been presented, this Court will have to
25 determine whether defendants have presented a genuine

1 issue of material fact on that point so there are
2 limitations on who can bring an antitrust claim except
3 that those limitations are not necessarily ones that can
4 be applied at this stage of the proceedings before any
5 type of discovery.

6 The second point is that there are other standing
7 tests that this Court could adopt. South Dakota law has
8 not specifically defined what the standing tests should
9 be for actions by indirect purchasers or other victims of
10 antitrust violations but Justice Brennan gave a full
11 account of what he thought the test should be in his
12 dissent in Illinois Brick. I think this Court is
13 entitled to give some weight to Justice Brennan in
14 Illinois Brick. That it's ultimately the decision that
15 the South Dakota legislature agreed with and Justice
16 Brennan said that the test should be whether the
17 plaintiff's injury would be a reasonably foreseeable
18 consequence of the defendant's illegal conduct.

19 That's the so-called target area test and it is
20 based accordingly on, Justice Brennan, an accepted
21 general tort principles who can sue for tort injury and
22 who can't. But the point to return to is that the
23 defendants are trying to craft an antitrust standing rule
24 which the Supreme Court adopted for the purpose of
25 furthering federal antitrust policy on to South Dakota

1 law which has an entirely different policy and entirely
2 different scope and that effort should be rejected by
3 this Court because it's inconsistent with the will of the
4 South Dakota legislature. Thank you, your Honor.

5 THE COURT: All right. We'll take a short
6 recess and then I'll hear your response.

7 MR. BOMSE: Thank you, your Honor.

8 (Whereupon, a recess was taken.)

9 THE COURT: All right. Mr. Bomse.

10 MR. BOMSE: Thank you, your Honor. It seemed
11 to me trying to put Mr. -- put this argument together, we
12 are kind of following progression. The first is that
13 there are no standing requirements. Second, Associated
14 General Contractors is really just Illinois Brick.
15 Third, we don't --

16 THE COURT: Would you repeat that, please?

17 MR. BOMSE: Yes. The second is that the
18 Associated General Contractors is just Illinois Brick.
19 It's the same considerations and the same analysis.

20 THE COURT: Well, if the South Dakota
21 legislature, in drafting 37-1-33, is attempting to use an
22 Illinois Brick repealer, what does that do to the
23 standing factors set out in the contractor's case?

24 MR. BOMSE: It says that you have to interpret
25 Associated General Contractors in light of that and

1 that's --

2 THE COURT: What does that mean, which survive?

3 MR. BOMSE: Very simple. The first factor
4 needs to be modified. That is, the first factor is
5 whether somebody is a competitor or a consumer. That
6 factor means that you have to have somebody who is
7 someone somewhere in the chain of defendants
8 distribution. That is, you can't -- you can't simply
9 have an interpretation which does away with what the
10 South Dakota legislature does any more than you can
11 simply interpret what the South Dakota legislature did as
12 doing away with all antitrust standing requirements. So,
13 what you do is you look to the defendants chain of
14 distribution. And the problem here is that the
15 plaintiffs don't satisfy that. They are not somewhere in
16 the defendant's chain of distribution.

17 Now, where do I get that? Well, I get that from the
18 statute -- from the notion that we want to reject
19 Illinois Brick. But I get it somewhere else. I get it
20 from Justice Brennan's dissent. What you were told when
21 we finally got to the fourth step in plaintiff's argument
22 on page 20 of their brief where the heading is "standing
23 under South Dakota's antitrust law should be determined
24 according to the target area test from Justice Brennan's
25 dissent in Illinois Brick". If you go to Justice

1 Brennan's dissent in Illinois Brick, this is what you
2 find. You find Justice Brennan saying, "I concede that
3 despite the broad wording of Section 4, there is a point
4 beyond which the wrongdoer should not be held liable".
5 This is on pages 760 and 761 of that opinion. And then
6 he goes down in the paragraph and he says, "but if the
7 broad language of Section 4 means anything, surely it
8 must render the defendant liable to those within the
9 defendant's chain of distribution". That is, if you have
10 an indirect purchaser who bought a product further down
11 the chain or although I think this is less clear, you
12 have somebody who bought a product that contains an
13 ingredient, their vitamin example or the Microsoft
14 example, where the operating system gets incorporated
15 into a computer that is purchased by a consumer, you
16 would meet the South Dakota test, at least that part of
17 it. But where you have just what we have called an
18 overhead suit. That is something that just says because
19 the costs of doing business are increased, everybody can
20 sue for anything, then you're way outside.

21 THE COURT: So you submit that the first factor
22 of Associated Contractors survives and Illinois Brick is
23 a repealer?

24 MR. BOMSE: I suggested it survives in the
25 modified format indicated, yes. Yes.

1 THE COURT: What about the remaining factors?

2 MR. BOMSE: The second factor is about whether
3 injury is direct or derivative. The Court in Associated
4 General Contractors used the term indirect. But if you
5 go to that portion of the opinion, you'll see that they
6 didn't cite Illinois Brick. They weren't invoking the
7 Illinois Brick part. What they were talking about was
8 injury that is derivative. Injury that has some
9 intervening cause. And if you understand it in the way
10 that the Supreme Court actually is talking about it, as
11 opposed to turning into it into a simple slogan, then
12 that phrase applies -- that part of the test applies as
13 well.

14 The third factor is, is there somebody else more
15 directly injured? It seems to me that the -- that is
16 what the Court in Minnesota suggested. It's hard to
17 apply that factor literally here. Although let me have a
18 caveat to that. Because the factor actually is there is
19 somebody more directly injured with a motivation to sue.
20 What they're really saying is, do we have a trouble of
21 antitrust violation perhaps not being pursued by anybody
22 and if you take Microsoft as an example, in Microsoft,
23 the indirect purchaser suits. The consumer suits tended
24 to be the only ones that were brought at least initially.
25 So in that case somebody could argue, under South Dakota

1 law, we would meet the third -- the third factor.

2 Then when you get to the fourth factor, and at some
3 point I'm gonna outrun my memory, but we are concerned
4 with speculativeness of damages and I would suggest to
5 the Court that that factor absolutely was intended still
6 to apply.

7 THE COURT: All right. Now, does 37-1-33,
8 which refers to the duplicative recovery which is the
9 fifth factor. What is the South Dakota legislature --
10 the fifth factor under Associated General Contractors is
11 whether the claim risk duplicative recovery. What is the
12 South Dakota legislature intended by the last sentence of
13 37-1-33 when they indicate that the Court may take any
14 steps necessary to avoid duplicative recovery against a
15 defendant?

16 MR. BOMSE: Well, I could -- I could be very
17 aggressive in my reading of that and say that the South
18 Dakota legislature intended not to allow this kind of a
19 suit where there already has been an earlier suit with a
20 recovery. But I don't think that's right. I think that
21 would be an overreading on my part. Now, I don't have
22 legislative history here which answers that question
23 either way, but I don't want to over argue this because
24 I'm telling you that I think we have to have an
25 appropriate reading one way, so I'm not gonna tell you

1 that this was meant to take away this case as a matter of
2 law. We didn't argue that in our papers. I think what
3 it was reflecting was a clear sensitivity to it. It is
4 plainly reflecting the notion that somewhere down the
5 line, if this case were to go forward, we would need to
6 deal with that, whether it means we're gonna bring in all
7 of the merchants in South Dakota and seek indemnity from
8 them.

9 THE COURT: Is factor affecting standing?

10 MR. BOMSE: I don't think it's factor.... I don't
11 think it's a factor here affecting standing, but I
12 certainly think that it is a factor that is pertinent --
13 I think I'm not -- I think I didn't articulate that
14 correctly. I don't think that this clause that you read
15 has to do with standing. I do think that duplicative
16 recovery does have to do with standing. That is, it is
17 something you are expected to take into account.
18 Remember, Associated General Contractors, your Honor, if
19 you look at the opinion, the Court is very clear about
20 this. It's saying, look, we can't just give all federal
21 courts a checklist of things to go down in every case and
22 if you hit three out of five, you lose. If you only hit
23 one out of five you win. They said that's not the way
24 you do this. You have to look at the overall situation
25 in light of these factors and you have to make a

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1 judgment.

2 THE COURT: Are you urging the Court to find
3 that the action will result in a duplicative recovery?

4 MR. BOMSE: Absolutely.

5 THE COURT: And therefore should bar standing?

6 MR. BOMSE: I'm asking the Court to find that
7 because of the clear potential for duplicative recovery,
8 there is less need for this kind of litigation and that
9 is something that ought to be part of the Court's
10 calculus. It is not sufficient standing alone, no pun
11 intended, to bar standing. But it certainly is something
12 that plainly was intended to be taken into account and
13 the legislature made that clear.

14 All we're suggesting, your Honor, is that it is
15 clear enough that standing requirements are not simply
16 subsumed by Illinois Brick or by an Illinois Brick
17 repealer. They are not the same thing. If you go back
18 to footnote seven in Illinois Brick, the Court has a long
19 discussion there about the relationship between standing
20 on one hand and Illinois Brick on the other. And that's
21 where the phrase analytically distinct comes from.

22 In fact, in that case, the Court recites the history
23 in footnote seven. In that case, the defendants had
24 actually won on standing grounds in the lower court, but
25 then the Supreme Court chose, after it granted the cert,

1 not to go off on generalized standing, but to in fact
2 adopt the policy based response, the corollary to Hanover
3 Shoe, and say we're not going to allow any indirect
4 purchaser suits. That's a bright line test.

5 As counsel pointed out to you, it was about seven
6 years later when the Court got to the generalized
7 question of standing in Associated General Contractors.
8 Illinois Brick was already on the books. And it then
9 went through those factors because it said and the Court
10 there in Associated General Contractors, started out with
11 actually the same kind of observation that you heard from
12 Mr. Mitby. That's with the observation that a literal
13 reading of the statute is broad enough to encompass every
14 harm that can be attributed directly to or indirectly to
15 the consequences of an antitrust violation.

16 And the Court then proceeded, of course, to reject
17 that. It did it by going through and I was -- I'm
18 starting here on pages 529 and 530. But if you then
19 start there and go through the next several pages, you
20 will see the Supreme Court, going through a very
21 elaborate analysis of limitations on similarly broad
22 statutes, saying you can't mean what that says. You have
23 to have some limitations. And it goes through the
24 variety of limitations that were applied at common law in
25 both tort and contract actions and it does it actually

1 for several pages. It's not something we kind of throw
2 off. And that was then the prelude to their discussion
3 of standing factors. And as we say, the courts have been
4 fairly resolute and the Illinois Brick repealer states in
5 still, saying, yeah, we have to have standing limitations
6 because otherwise you get into certain situations that
7 really don't make any sense and in some ways if you
8 allow, as the Minnesota court concluded, a case this
9 broad, what do you really have? You have, as I said,
10 these overhead cases with damages, to use its word,
11 "inherently and hopelessly speculative".

12 I mean, on our way to lunch today we were talking
13 about the telephone example, Mr. LeBrun and I, and he
14 observed that under this theory of standing and the
15 telephone case really isn't, with all respect to
16 Mr. Mitby, any different in terms of it's breath or in
17 terms of the number of layers. You have a situation in
18 which the telephone company overcharges a business, a law
19 firm. A law firm raises its rates to its clients. The
20 clients, a restaurant, then serves food to a consumer and
21 the consumer says I paid an overcharge somewhere in that
22 because it would be passed down along that chain. I
23 mean, if one wants to really say that that is it because
24 of the words of the statute, I think you have done a
25 disservice to what the South Dakota legislature actually

1 had in mind in these cases. I think that granting our
2 motion to dismiss here is not in any way going to cause
3 harm to the intent of the legislature and to appropriate
4 indirect purchaser cases.

5 I think on the other hand, opening up this kind of
6 an overhead case will do that kind of harm. And I think
7 that the standing rules exist for the purpose of
8 preventing that from happening and they do have an
9 independent life independent of Illinois Brick.

10 The argument here, you know, it isn't like standing
11 somehow was invented after or at the time of Illinois
12 Brick. We have had standing rules in antitrust cases
13 both federal and state going well back into the beginning
14 of the Sherman Act. One of the most famous cases Hawaii
15 against -- Hawaiian Standard Oils in 1972 and many other
16 standing cases before that.

17 What they are suggesting to you is that somehow when
18 the State of South Dakota responded to Illinois Brick by
19 saying we're gonna allow indirect purchaser claims; that
20 they somehow silently intended to wipe out that whole
21 body of law and I think that's just a heroic and
22 unjustified reading which will have mischief and, you
23 know, I don't know if I'm being persuasive to this Court,
24 but I have been persuasive in other courts because I
25 think that when you do think, and I tried to listen

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1 carefully, and the one thing that I didn't hear, other
2 than the conclusions about how this isn't speculative and
3 it isn't something that we can decide now, I didn't hear
4 a response to how you deal with what is manifest on the
5 face of this complaint.

6 My example about the Saturday morning errands or my
7 discussion of overhead or the fact that you are simply
8 opening the doors to claims that we don't need to have
9 further procedures in order to determine that they're
10 inherently and hopefully less speculative or as the Court
11 in New York said, "the complexity and speculative nature
12 are overwhelming" or as Michigan said, "the claims are
13 speculative and would be incredibly complex". I
14 respectfully submit, your Honor, that it stands there on
15 the face of this -- of this complaint. Standing cases
16 are resolved with all respect at the pleading stage.
17 That's almost always the way they are resolved because we
18 can cut them off that way. We're not asking you to deny
19 the allegations of the complaint, we're asking you to
20 accept them and to say accepting them, but accepting them
21 without leaving our common sense at the door. We can
22 figure out what it is you're asking us to do here and
23 we're gonna say that this simply goes -- goes too far.
24 Now, you know, I have some very specific things I
25 could tell your Honor about what plaintiffs have to say.

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1 For example, their reference to Article III standing in
2 the case that they gave you. I was -- I was puzzled,
3 since most of us know who do antitrust, that Article III
4 standing and antitrust standing are two different
5 animals. And if you need to have a cite for that, it
6 happens that the Court said it in Associated General
7 Contractors in footnote 31 where they talk about the fact
8 that the two things are different. I mean, it talks
9 about court antitrust cases needing to make a further
10 determination whether the plaintiff is a proper party to
11 bring a private antitrust action so it isn't just Article
12 III standing.

13 The other piece of paper that we were all handed
14 about the difference between New York and North Dakota
15 antitrust laws versus South Dakota. I would say that
16 while the words may not be identical, the meaning is
17 identical and, of course, that leaves Michigan and
18 Minnesota unaddressed at all including the assertions
19 made in the briefs that were submitted by the plaintiffs'
20 firm here about how the Minnesota statute is identical
21 and interpretations are particularly important.

22 I think I have dealt with the target area issue in
23 the sense of explaining to you exactly what it was
24 they're arguing, the Justice Brennan test and referring
25 you to what he had to say what that means. I mean, their

1 own recognition that there needs to be some test, says
2 that even they can't bring themselves at the end of the
3 day to really argue that there should be no standing
4 limits. What they want you to do is instead to accept a
5 test that has been rejected and reject a test which has
6 been accepted, but when we look at the test that they
7 offer you, it is a test that were in fact -- that they
8 don't meet. That is, Justice Brennan, in the chain of
9 distribution. These people who are not in the chain of
10 distribution don't even have to have a debit card.
11 They're not indirect purchasers. They're not purchasers
12 of a product with ingredients. They are simply people
13 who purchased something that's supposedly went up in cost
14 because instead of telephone service or janitorial
15 services or rent being increased, debit card fees were
16 increased and that brings us back to whereas the
17 Minnesota court, we think, correctly concluded, you have
18 no limits at all. We don't think that makes sense.

19 THE COURT: Mr. Mitby, do you want to respond?

20 MR. MITBY: Thank you, your Honor. We're not
21 arguing for no limits at all. There are limits. The
22 limits are that you have a cognizable antitrust injury
23 that the Plaintiffs have done in this case. It is not a
24 situation where some law firm was passing a minute charge
25 from on a telephone bill to its customers. This is a

1 situation where the debit card fees are in the order of
2 1.5 percent or a little bit less on every hundred dollars
3 spent using a debit card. That's a lot of money. That's
4 why we have alleged that the actual damages in this case
5 exceed 12 billion dollars, treble would be 36 billion
6 potentially and that's why we believe that consumers in
7 South Dakota bore a significant part of this overcharge.
8 It's not a daisy chain of causation. In this case there
9 are two injured parts here, merchants and consumers.
10 Whatever portion of these illegal overcharges, the
11 merchants did not absorb in their overhead, consumers had
12 to pay out of pocket. Consumers under South Dakota law
13 have standing to sue because Section 37-1-33 grants
14 standing to any party who has been injured by an
15 antitrust violation and the courts across the country
16 have dealt with consumer class actions in the antitrust
17 context and outside the antitrust context. It's not a
18 case that the complexities in this instance are so
19 overwhelming that we should disregard the plain language
20 of the South Dakota legislature and decide to ignore the
21 South Dakota legislature's rejection of the very standard
22 that the defendants advocate here and then simply allow
23 these claims to go without any compensation at all.
24 Should the defendants just get away with this? Should
25 the defendants be allowed to get away with illegal

1 antitrust activity simply because they adopted rules that
2 require merchants to plead the costs? These illegal
3 arrangements controls all goods instead of simply charge
4 the debit customers on those goods, that would allow
5 defendants to profit from their own ability to implement
6 this illegal scheme in a particular way. And this Court
7 shouldn't allow that. That's gonna allow every defendant
8 to structure its conduct so that it can come into court,
9 as the defendants are doing today, and argue that the
10 very victims of their illegal practices don't have
11 standing or fail for some other reason under the
12 antitrust laws.

13 Now, I like to address the point that Mr. Bomse made
14 regarding the so-called analytical distinction between
15 standing requirements and the concept of a legal injury
16 question. The two injuries may be analytically distinct,
17 but as a practical matter, they're related. That's why
18 five out of five of the factors are articulated in
19 Associated General Contractors relate to whether the
20 plaintiff had suffered a cognizable injury under federal
21 law, i.e. was a direct purchaser, and whether the
22 plaintiff was in a position to recover damages for that.
23 And I've given you one example of a standing case in the
24 Article III context where the Court explained the
25 relationship between substantive injury and standing, but

1 could I give you examples from other contexts as well? I
2 don't think -- and I think perhaps the best example is
3 Associated General Contractors, itself, where the
4 standing factors that the Supreme Court asked courts to
5 consider when evaluating standing are based on the same
6 set of factors that it used in Illinois Brick to adopt
7 the direct purchaser rule. The point is that if a
8 standing requirement is based on the notion that only
9 direct purchasers are ever gonna be entitled to recover
10 for an antitrust injury and so therefore we ought not to
11 hear claims from people who don't allege that they are in
12 fact direct purchasers, we can't import that concept into
13 South Dakota law because, your Honor, if we import that
14 concept into South Dakota law, we'll be overriding what
15 the legislature intended which is for anyone injured by
16 antitrust violations to be able to recover not just
17 direct purchasers, as the US Supreme Court has said.

18 THE COURT: What assumption can you draw about
19 the repealer? Are you assuming that the repealer goes
20 beyond the mere holding of Illinois Brick?

21 MR. MITBY: Yes, your Honor, I am assuming that
22 because the repealer is broader than repealers adopted by
23 other states. We seen two examples, North Dakota and New
24 York. Those repealers are not substantively identical as
25 the defendants claim. What they say is that a Court

1 can't use the fact that the plaintiff didn't have a
2 direct relationship with the antitrust violator. In
3 other words, won't in privity.

4 I believe that the language from the statute is
5 dealt directly. You can't use the fact that the
6 plaintiff didn't deal directly with the defendant to bar
7 recovery. That's different from saying that anyone who
8 suffers an injury and I'll just quote the statute from
9 the beginning again. The statute says "no provision of
10 this chapter may deny any person who is injured directly
11 or indirectly in his business or property, by a violation
12 of this chapter, the right to sue for and obtain any
13 relief afforded under 37-1-14-3". That's different from
14 saying simply that's the fact and I quote, "the fact that
15 the state political subdivision, public agency or person
16 threatened with injury or injured in its business or
17 property by any violation of the provisions of this
18 chapter, has not dealt directly with the defendant, does
19 not bar recovery". In other words, in North Dakota and
20 New York other factors might bar recovery even from
21 someone who has a bona fide antitrust injury. In South
22 Dakota the legislature has said that that approach is
23 wrong and is not gonna be the policy of this state.

24 I'd like to call your Honor's attention to the
25 second part of 37-1-33 which allows this Court to take

1 measures necessary to prevent duplicative recoveries. I
2 notice from your Honor's questions that your Honor is
3 wondering about the relationship between those two
4 provisions and contrary to what the defendants are
5 saying, I submit to you that that second part of the
6 statute basically says the legislature says we recognize
7 the concerns about duplicative recoveries, but we don't
8 want to simply bar indirect purchaser suits all together
9 whether on standing grounds or injury grounds. We want
10 courts to deal with this on a case-by-case basis and we
11 want courts to use the many tools that are available from
12 joinder to class action devices to settlement credits to
13 some kind of jury instruction reducing the amount of
14 damages in an appropriate case. We want courts to make
15 this decision on a case-by-case basis, not a Supreme
16 Court to incorporate the concern about duplicative
17 recoveries into a bar to standing which is one of the
18 things that the -- which is the approach that federal law
19 has taken. South Dakota's rejected that approach and it
20 has instead asked courts to do the work in an individual
21 case of deciding how to minimize the risk of duplicative
22 recoveries rather than trying to generalize that issue
23 into a bar to standing that would leave some people
24 uncompensated.

25 In this case, we have conduct that, according to the

1 allegations in this complaint, I don't even think the
2 defendants are disputing this part of it. That
3 Mastercard and Visa don't allow their merchant
4 subscribers to pass on the charges of these debit
5 transactions to debit customers. They have to spread
6 them across the cost of goods generally or else they get
7 thrown out of the Mastercard/Visa system. Now, should
8 Mastercard and Visa be entitled to profit from an illegal
9 tying arrangement that has this feature by being able to
10 bar consumers at the courthouse door, I think not. And I
11 think that -- I submit to you, your Honor, that the South
12 Dakota legislature has said that anyone who suffers an
13 antitrust injury is entitled to sue for damages and these
14 consumers are entitled to sue. Thank you.

15 MR. BOMSE: Your Honor, may I, as moving party,
16 in closing in less than a minute, I believe.

17 THE COURT: You may.

18 MR. BOMSE: First of all, may I respectfully
19 rise to the challenge that was made. It isn't in the
20 motion you would have to justify the proceedings, maybe
21 it's entirely incorrect in his statement about our rules.
22 If the Court had any question about that, we could submit
23 the rule which does allow a differential in pricing, but
24 I don't think it's here nor there. I just don't want to
25 let that misstatement go uncorrected, particularly when

1 it's suggested we concede that that is the situation.

2 But as I say, that is neither here nor there.

3 It seems to us, and this is the only point I want to
4 make, that Plaintiffs have really put to the Court a
5 challenge. That is to conclude that the legislature
6 silently intended to do more than repeal Illinois Brick,
7 when I think it's quite clear from the legislative
8 history here, as everywhere else, that it was an Illinois
9 Brick repealer statute. The timing all came about, it
10 would have been an easy enough thing for the legislature
11 to say that we intend to eliminate standing requirements.
12 So I think that they are in fact asking your Honor to go
13 beyond where the legislature actually chose to go.

14 I would observe, your Honor, that if you go back to
15 the federal statute, itself, that was at issue in AGC.
16 It is every bit as broad in its terms as the statute in
17 South Dakota. Any person who shall be injured in his
18 business or property by reason of anything forbidden in
19 the antitrust laws may sue therefore that's the statute
20 that the Court -- the Supreme Court voted in AGC just
21 before it talked about how a literal reading of the
22 statute is broad enough to encompass any harm that can be
23 contributed to directly or indirectly to the consequence
24 of a antitrust violation. So we have -- this Court has
25 the same issue in front of it that the Court had -- the

1 United States Supreme Court, that is the AGC case, that
2 is what to make of this language and both sides have
3 suggested to you what we think you should make of it.

4 THE COURT: All right. Thank you. Counsel,
5 the Court has considered the numerous authorities that
6 you have presented and the briefs you have submitted as
7 well as the at least an hour and a half of oral argument.
8 The Court in this case grants the motion to dismiss. The
9 Court relies on significant portions of Associated
10 General Contractors in applying several of the factors,
11 specifically factors one and five. The Court finds that
12 the Plaintiffs lack standing as they are not alleging
13 injury as consumers in the relevant market. Debit card
14 services that the antitrust law would seek to protect and
15 since the class of merchants has already recovered a
16 judgment, this suit would only threaten to duplicate the
17 recovery.

18 So the Court relies on factor one in Associated
19 General Contractor and factor five in making its
20 determination that the plaintiffs lack standing in this
21 case.

22 Again, the plaintiffs are not participants in the
23 relative market affected by the anti-competitive conduct
24 and further that the merchants have already recovered and
25 that there is a significant and real risk of duplicative

1 recovery.

2 The Court assumes that there may be an appeal
3 brought to the South Dakota Supreme Court from this
4 Court's ruling and the Court thanks you for the effort
5 that you have put into preparing both of your arguments.
6 They were very well prepared and well argued.

7 You are directed to prepare an order for dismissal
8 on behalf of Visa and Mastercard, Mr. Bomse to submit it
9 to Mr. Mitby for his review prior to submission to the
10 Court.

11 With that, we're adjourned.

12 (End of proceedings.)
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1 STATE OF SOUTH DAKOTA)

2 COUNTY OF PENNINGTON)

) ss.

CERTIFICATE

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4
5 I, Jean A. Kappedal, RPR, Official Court Reporter
6 of the Seventh Judicial Circuit and Notary Public
7 within and for the State of South Dakota, do
8 hereby certify that the testimony of the proceedings
9 that came on for hearing in the aforecaptioned matter,
10 contained on the foregoing pages, 1 - 55, inclusive,
11 was reduced to stenographic writing by me and hereafter
12 caused to be transcribed; that said testimony commenced
13 on the 28th day of September, 2004, in the Courtroom
14 of the Pennington County Courthouse, Rapid City,
15 South Dakota; and the foregoing is a full, true and
16 complete transcript of my shorthand notes of the
17 proceedings had at the time and place above set forth.

18 Dated this 22nd day of October, 2004.
19
20
21

22 COPY

23 Jean A. Kappedal, RPR
24 My Commission Expires: 2/13/10
25

Jean A. Kappedal, RPR